Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-526

SECURITIES INVESTOR PROTECTION CORPORATION,

Cross-Petitioner,

–against–

TOUCHE ROSS & CO., and EDWARD S. REDINGTON, as Trustee for the liquidation of the business of Weis Securities, Inc.,

Respondents.

BRIEF OF RESPONDENT TOUCHE ROSS & CO. IN RESPONSE TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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INDEX

	PAGE
COUNTER-STATEMENT OF THE QUESTION PRESENTED	2
COUNTER-STATEMENT OF THE CASE	2
THE REASONS WHY TOUCHE ROSS DOES NOT OPPOSE SIPC'S CONDITIONAL CROSS-PETITION	2
CONCLUSION	3

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Is SIPC, an entity created by Congress in 1970 for purposes of providing to customers of securities brokerage firms increased financial protection, a beneficiary of the reporting requirements imposed by Section 17(a) of the Securities Exchange Act of 1934 such that SIPC may maintain in its own right an implied private right of action for violations of Section 17(a)?

COUNTER-STATEMENT OF THE CASE

The relevant facts are set forth in Touche Ross' Petition in No. 78-309. With respect to the question presented by SIPC's conditional cross-petition, the District Court held that SIPC "could [not] possibly have been meant to be protected by Section 17" (54a). Both the Court of Appeals majority and the dissent agreed with that holding. The majority stated that "it is indisputable that SIPC is not the kind of entity Congress sought to protect either in 1934 or in 1970" (12a [n.13]). Judge Mulligan, who dissented from the majority's holding that customers of a brokerage firm (and SIPC as their "subrogee") may assert an implied private right of action under Section 17(a), stated that

> "The majority has properly held that neither the trustee nor SIPC in its own right can bring any action under section 17(a) of the [19]34 Act. Neither can claim to be an intended beneficiary of that act since both are the creatures of SIPA, enacted in 1970. Nor is either appellant a public investor." (33a-34a)

THE REASONS WHY TOUCHE ROSS DOES NOT OPPOSE SIPC'S CONDITIONAL CROSS-PETITION

Unlike the questions presented by Touche Ross' Petition in No. 78-309, the question presented by SIPC's conditional cross-petition is, as SIPC concedes, not "of

such significance as to, in and of itself, merit consideration by this Court" (Conditional Cross-Petition, p. 5). For the reasons stated in the decisions below, Touche Ross submits that SIPC's arguments on the merits of the question presented by the conditional cross-petition are completely erroneous. However, Touche Ross does not disagree with SIPC's contention that if this Court grants review with respect to the questions of Section 17(a) liability presented by Touche Ross in No. 78-309, this Court should have the opportunity to consider all questions necessary for "a definitive and complete determination" of whether any private right of action may be implied under Section 17(a) (Conditional Cross-Petition, p. 5). Therefore, without conceding the relevance or correctness of any of SIPC's contentions as to the merits, Touche Ross does not oppose SIPC's conditional cross-petition.

CONCLUSION

For the foregoing reasons, Touche Ross does not oppose SIPC's conditional cross-petition for a writ of certiorari.

October 25, 1978.

Respectfully submitted,

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